BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
3-28-14
04:59 PM

Application of California-American Water Company (U210W) for Authorization to Increase its Revenues for Water Service by $18,473,900 or 9.55% in the year 2015, by $8,264,700 or 3.90% in the year 2016, and by $6,654,700 or 3.02% in the year 2017.	A.13-07-002 (Filed July 1, 2013)

REPLY BRIEF OF THE OFFICE OF RATEPAYER ADVOCATES REGARDING THE ADMINISTRATIVE LAW JUDGE'S ORDER TO SHOW CAUSE REGARDING CALIFORNIA-AMERICAN WATER COMPANY'S VIOLATION OF RULE 1.1

I. INTRODUCTION

On March 19, 2014, California American Water ("Cal-Am") requested leave from the presiding Administrative Law Judge ("ALJ") via e-mail to reply to the Office of Ratepayer Advocates ("ORA") Opening Brief on the ALJ's Order to Show Cause ("OSC") Regarding Cal-Am's Violation of Rule 1.1. The ALJ granted Cal-Am's request on March 19, 2014, also giving ORA leave to file a reply, and setting a reply date of March 28, 2014. Pursuant to Rules 11.1(f) and 1.15 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, this is ORA's Reply.

II. ANALYSIS

A. Cal-Am's Actions Warrant a Penalty.

Cal-Am argues that even if the Commission finds that it violated Rule 1.1, no penalty is warranted because Cal-Am has cooperated with the Commission in this proceeding.[1] Cal-Am's contention is both factually incorrect and legally untenable.

[1] California-American Water Company Post-Hearing Brief on the Order to Show Cause, A.13-07-002 (March 17, 2014) (Cal-Am Opening Brief) at pp. 12-15.

First, at no point has Cal-Am admitted its mistake. Instead, Cal-Am has repeatedly presented the Commission with a confused and strained interpretation of a simple Minimum Data Requirement ("MDR")—a requirement that the Commission has had in effect since 2007.[2] Cal-Am has failed to admit that it provided inaccurate information even though it has repeatedly admitted that numerous projects that had been authorized for test years 2011 to 2013 were never built and were not listed as unbuilt projects in the MDR.[3] Cal-Am continues to defend its conduct by arguing that its interpretation of the MDR is reasonable. Failure to accept responsibility for violating a legal requirement, in this case a simple but important disclosure requirement, is one factor the Commission considers when determining if a penalty is merited,[4] and, if anything Cal-Am's refusal to acknowledge the errors in its MDR filing warrants an *increase* in any fine assessed.

Secondly, in attempting to justify its interpretation of the MDR, Cal-Am provided additional incorrect information. In its initial response to ORA's motion, Cal-Am stated that 2013 was not a test year, and thus it need not have included projects set for completion in 2013 in its MDR response.[5] During the March 6, 2013 OSC hearing, Cal-Am reversed course on this issue and admitted that 2013 was a test year.[6] Also at the OSC hearing, Cal-Am's witness testified that there were no 2011/2012 test year projects that had not been built by February 2013 that were not identified in the MDR response, but later contradicted himself, indicating that there were projects authorized for

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[2] In addition, the MDRs in the RCP were adopted from ORA's "master data request" which was used by ORA prior to 2007 and required utilities to include "a list of projects previously authorized by the Commission that have not yet been completed." Thus, Cal-Am has been responding to the exact same question in its GRC's since 2004.

[3] *See e.g.,* Response of Cal-Am to the Motion of ORA for a Companion OII Regarding Cal-Am's Responses to MDRs and Whether the Company Violated Rule 1.1 (Cal-Am's Response to Motion) at 4; Hearing Tr., at 28:13 – 20, 58:13 – 17; Brief of the Office of Ratepayer Advocates Regarding the Administrative Law Judge's Order to Show Cause Regarding California-American Water Company's Violation of Rule 1.1 (ORA Opening Brief) at pp. 2-3.

[4] *See* D.98-12-075 at p. 20-21.

[5] Cal-Am's Response to Motion at p. 4.

[6] Hearing Tr. 16:28-17: 1-2.

2011/2012 that were "very likely to be constructed in 2013."[7] Similarly, when asked whether Cal-Am's MDR response "include[d] all projects authorized in rates for 2011and 2012 but not built," Cal-Am's witness responded that the MDR response did include all 2011/2012 projects that were not built,[8] which contradicts Cal-Am's prior statements that there were seven 2011/2012 projects not included in the MDR.[9] These contradictory statements hardly constitute a model of cooperation and forthrightness. At best, they indicate management's lack of familiarity with the details of its own application and with MDR requirements.

Finally, Cal-Am did not voluntarily bring this issue to the Commission's attention. This matter came to the Commission's attention because ORA filed a motion. In fact, this issue only came to ORA's attention because what ORA's witnesses observed in the field was inconsistent with the application. If ORA had not inquired as to the status of certain projects during site visits, this issue may never have been discovered.

This situation is different from, for instance, Pacific Gas &Electric's ("PG&E's") actions in a recent Rule 1.1 proceeding wherein PG&E itself brought inaccurate information to the attention of the Commission, although PG&E delayed submitting the information and it was presented in an improper format.[10] Responding to ORA's data request and motion, and appearing at an OSC as ordered, hardly constitutes "cooperation" for which Cal-Am should be rewarded. Instead, Cal-Am should receive the appropriate sanction for the inaccuracies in its initial filings, and its lack of candor and clarity in correcting inconsistencies in the information it has presented to the Commission as part of this application and in response to ORA's discovery efforts. Cal-Am should not be excused for its behavior in this Rule 1.1 proceeding, but instead, should be fined in excess of $100,000[11] for misleading the Commission via a false statement of fact.

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[7] *Compare* Hearing Tr. 29:11 – 20 *with* Hearing Tr. 56:1 – 12.

[8] Hearing Tr.52:27-28 to 53: 1-5.

[9] Cal-Am's Response to Motion at pp. 5-6.

[10] D.13-12-053.

[11] *See* ORA's Opening Brief at pp. 6-10 discussing penalty calculations.

B. There is Ample Evidence in the Record Demonstrating Intentional and Grossly Negligent Conduct by Cal-Am Warranting a Rule 1.1 Violation and a Penalty.

Cal-Am argues that there is no evidence it acted intentionally to deceive the Commission. But Cal-Am admitted that it intentionally excluded the bulk of projects at issue from its MDR response. Further, Cal-Am acknowledged that even after it knew that its MDR response was inaccurate (even by its own strained interpretation), it made no effort to notify the Commission that the MDR response was inaccurate.[12]

Cal-Am also argues that there is no evidence of reckless or grossly negligent conduct.[13] Cal-Am cites to *City of Santa Barbara v. Superior Court*, a case in which parents of a child who drowned in a city pool alleged that the city's actions were reckless.[14] Cal-Am uses this case to argue that there needs to be a finding of conduct "so unreasonable and dangerous that . . . it is highly probably that harm will result."[15] That standard is inapplicable here. Utilities have a duty to provide accurate information and not to mislead the Commission or its staff through false statements of fact or law. There is no requirement that the Commission find that Cal-Am's actions put anyone in danger of harm. Moreover, misleading the Commission harms the regulatory process. Cal-Am intended to provide the inaccurate information – its intent to mislead the Commission is not relevant to the inquiry of whether inaccurate information was actually included in the application.

Cal-Am also cites this case for the position that gross negligence requires a finding of "want of even scant care" or an "extreme departure from the ordinary standard of conduct."[16] Both of those standards have been met here. The Cal-Am employee who prepared the MDR: (1) misread the plain language of a simple MDR; (2) deliberately excluded the majority of projects that were responsive to that MDR; (3) did not include a

[12] Hearing Tr. 29:2-8, 29:23-26; 29:27-28 to 30:1-7; 36:17-21.

[13] Cal-Am's Opening Brief at pp. 6-10.

[14] *City of Santa Barbara v. Superior Court* (2007), 41 Cal. 4th 747.

[15] Cal-Am Opening Brief at p. 9, quoting C*ity of Santa Barbara*, 41 Cal. 4th 747.

[16] Cal-Am Opening Brief at p. 9-10, quoting C*ity of Santa Barbara*, 41 Cal. 4th 747.

cross-reference to where information responsive to the MDR could be found elsewhere in the thousands of pages of Cal-Am's application; (4) never took steps to inform the Commission or ORA that the MDR was inaccurate before Cal-Am filed its application, even when he knew his response was no longer accurate under his own interpretation; and (5) never took steps to inform the Commission or ORA that the MDR required correcting after Cal-Am submitted its application. These acts demonstrate both a "want of even scant care" that the MDR response provide accurate information, as well as an "extreme departure from the ordinary standard of care," which, here, is to provide the Commission and its staff with accurate information, and not to mislead by omission.[17]

As discussed in ORA's Opening Brief, the Commission has previously found that providing inaccurate information in a data request meets the Rule 1.1 standard for at least gross negligence.[18]

Cal-Am also cites to D.01-11-017 for the position that not every mistake made by a utility warrants a Rule 1.1 violation. D.01-11-017 is inapposite here. In that case, the Commission found that sanctions were not warranted after WorldCom, a telecom company, paid its intervenor compensation 67 days late.[19] WorldCom sent the intervenor a check, which it then thought had been misdirected and lost, and therefore issued the intervenor a second check and a stop-payment on the first check. Both checks arrived however, both of which the intervenor deposited. At this point, WorldCom filed its answer regarding the late payment of the intervenor compensation. Subsequently, the first check was returned to the intervenor because of WorldCom's stop-payment request. Thus, the issue was whether WorldCom's statement in its pleadings that it had paid the

[17] *See e.g.,* D.01-08-019 (finding utilities are required to make a "concerted effort to verify the accuracy and integrity of the data response. . . A carrier should not avoid responsibility for the truthfulness of its representations to the Commission simply by neglecting to verify the completeness of material statements made by its employees or agents before releasing them to staff.").

[18] D.01-08-019 (finding a Rule 1.1 violation where utility failed to "provide truthful and complete answers to the data requests propounded and to exercise due professional care to ensure the integrity of information."); D.92-01-002 ("reckless conduct" and Rule 1.1 penalty assessed after cell-phone company made misleading statement to the Commission).

[19] D.01-11-017 at pp. 5-6.

intervenor twice violated Rule 1.1.[20] The Commission rejected the argument that WorldCom violated Rule 1.1 because "WorldCom's answer, as of the date it was filed, reflected the facts of which WorldCom was aware at that time."[21] In contrast, Cal-Am's MDR response in no way "reflected the facts of which [Cal-Am] was aware at that time." Far from it; Cal-Am failed to include the bulk of projects that had been authorized but not built despite this specific request in the MDR. Even when Cal-Am, by its own interpretation, knew the information it provided was no longer correct, it failed to alert the Commission in any way.

C. Cal-Am's Interpretation of the MDR is Patently Unreasonable and Warrants a Finding of a Rule 1.1 Violation and a Penalty.

Cal-Am continues to argue that it should not be found in violation of Rule 1.1 because its interpretation of MDR II.D.5 is reasonable. Cal-Am's position is not credible. Cal-Am admits that it excluded the majority of projects that had been authorized but not built in the test years because Cal-Am's witness thought they would still be built at some point.[22] Cal-Am continues to argue that it need not include those projects authorized in the test years but not built as long as it thinks those projects will be built eventually. As ORA has repeatedly noted, Cal-Am's interpretation of this MDR is inconsistent with the plain language of the MDR.

Specifically, Cal-Am argues that it did not provide "information on seven uncompleted projects that were authorized in the 2011 and 2012 test years but were not included in the MDR," because it thought these projects would be completed in 2013.[23] With regard to 2013 projects not yet built, Cal-Am acknowledges that there were an additional 19 projects excluded from the MDR response.[24] As Cal-Am's witness

[20] Id.

[21] Id.

[22] Cal-Am Opening Brief at p. 4.

[23] Cal-Am Opening Brief at p. 4.

[24] Cal-Am Opening Brief at p. 4.

acknowledged during the OSC hearing, the MDR has no contingencies or exceptions for projects that are still in progress, projects that Cal-Am expects or believes will be built, or for the variety of other contingencies and exceptions Cal-Am has artificially read into a simple sentence in an apparent effort to avoid responsibility for its mistakes.[25] Simply put, no plausible rationale exists for Cal-Am to deliberately omit information directly called for the in MDR.

Cal-Am also states that in failing to include these projects it "believed that ORA and the Commission were interested in projects that likely would not be built, not projects that had simply run behind schedule."[26] It is not clear why Cal-Am made this assumption; ORA is absolutely interested in projects that fall behind schedule. It is important to know the accuracy of Cal-Am's prior project forecasts to ensure that ratepayer money is being spent responsibly. Further, if Cal-Am says a project is needed in the year 2012, but the project is not actually constructed and placed into service until the year 2015, this calls into question the need for the project. These are some of the reasons the MDR calls for information about projects previously authorized but not built.

An answer that was actually responsive to the plain language of the MDR would have included all projects authorized for the test years but not built. If Cal-Am would have also liked to include an explanation for *why* these projects were not built or similar information, that would have been acceptable, but there is no excuse for simply choosing not to disclose projects requested in the MDR.

Incidentally, Cal-Am was incorrect in its assumption that all of the 2011-2012 projects and all 2013 projects it excluded from the MDR would be completed by 2013. Out of these seven 2011-2012 test year projects, four are now planned for completion in 2014 and two for 2015.[27] Out of the nineteen 2013 projects excluded from the MDR, ten are now set for completion in 2014, three for 2015, one for 2016, and funds have been

[25] Hearing Tr. 56:13-20, 58:10-12, 58:13-16, 58:25-28 to 59:1.

[26] Cal-Am Opening Brief at p. 4.

[27] Compare OSC Exhibit 3 (California American Water Capital Projects in Data Request Response RRA-001 by Category [of project year]) to OSC Exhibit 2, Cal-Am Data Request Response, at

deferred entirely for another project.[28] This again demonstrates the importance of receiving an accurate response to this MDR. An accurate accounting of the actual construction status of various capital projects authorized in the last rate case is essential so that ORA can evaluate the accuracy of Cal-Am's construction forecasts and determine whether Cal-Am is responsibly using ratepayer funds.

Cal-Am states that it "has pledged to improve its showing in its next general rate case application."[29] However, Cal-Am has already had six years and several rate case cycles to become familiar with the MDRs. Cal Am's strained interpretations of the MDR requirement cast doubt on its pledge to improve. Moreover, this pledge does not remedy Cal-Am's past Rule 1.1 violations, nor does it make up for the amount of time ORA and the Commission have spent addressing this issue. Financial penalties are necessary to deter such conduct. Utilities need to know that there will be financial consequences when grossly inaccurate information is provided in response to the Commission's minimum data requirements.

Utilities cannot be permitted to create their own interpretations of a minimum data requirement, particularly when that interpretation is so contrary to the plain language of the request. If Cal-Am is permitted to provide whatever information it deigns to provide, completely diverging from what is clearly requested, then the MDRs are effectively worthless.

Attachment 1 (the four projects now planned for completion in 2014 are: Wildwood Reservoir Tank Rehab, Main Between Hillcrest & Lawrence Drive, PRV Station Improvements, and SRCSD Connection; the two projects now planned for completion in 2015 are: Redrill Richardson Well and the Moorpark Reservoir Rehab).

[28] Compare OSC Exhibit 3 to OSC Exhibit 2, Cal-Am Response, at Attachment 1 (the ten projects now planned for completion in 2014 are: 8-inch Main in Armijo, Sprinks Reservoir Booster Station Improvements, Meter Conversation 2012-2013, Lincoln Oaks PCE/VOC Study, Mapping Improvement Project, Hollister Main Replacement Phase 2, Hollister Main Replacement Phase 3, Improvements to CMWD Interchange, Potrero Tank #3 and Upsize Dewey BPS, Replace Los Robles Tank # 1; the three projects now planned for completion in 2015 are: Arden Intertie, Oswego Well Replacement, 8-Inch Main at Rolling Oaks & Los Padres; the project now planned for 2016 is: the Santa Fe Well Replacement; and the project for which funds have been deferred entirely is: Rehab Oak Knoll Circle Well).

[29] Cal-Am Opening Brief at p. 14.

III. CONCLUSION

ORA respectfully requests that the Commission issue an order finding that Cal-Am violated Rule 1.1 by filing a misleading MDR response with the Commission, and sanction Cal-Am in excess of $100,000 to deter such misleading responses in the future.

Respectfully submitted,

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March 28, 2014